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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-619

ROBERT A. MANN AND BANK OF THE SOUTHWEST, NATIONAL ASSOCIATION, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners file this brief Reply to point out to the Court that the Solicitor General's Memorandum opposing Petitioners' request for certiorari, although filed out of time, nevertheless, is not only a meager document, but, most importantly, advances arguments which are novel enough, standing alone, to entitle Petitioners to a review by certiorari.

The Solicitor's arguments reflect the urgent need for this Court to more thoroughly review this case.

1. The first argument of the Solicitor [1] is the often-used position of the Justice Department that we should all wait awhile until presumptively innocent people stand an undoubtedly expensive trial. This demurrer completely misses the point of this appeal. The Gov-

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[1] Page 3, Solicitor's *Memorandum in Opposition*.

ernment's novel theory of prosecution has been challenged by proper motion raising serious threshold constitutional issues in a criminal case of major import to the nation's banking industry. The Petitioners should not have to wait the many months or years involved to again come back to this Honorable Court. The record is well documented and provides ample grounds for this Court to review the Motion to Dismiss now.

2. Secondly, the Solicitor opposes the granting of certiorari by advancing the novel argument that even though a bank *maintains legal title to its funds,* and even though such funds are kept in *its own account,* that the indictment, as clarified by the bill of particulars, is legally sufficient to charge the crime of conversion.[2] The fundamental novelty of this argument desperately needs review now. The import of this novel argument on the banking industry in the maintenance of the widespread practice of compensating balances and the placing of bank funds in their own bank accounts is obvious. Until the Government issued Circular No. 31, the practice was *never* challenged. To this day, no one knows the circumstances under which such practice is permissible.

Additionally, the Solicitor, in an attempt to show some detriment to the Waco bank, gratuitously argues, for the first time, that the Waco bank was prevented from exercising its right to draw interest on its own account at the Bank of the Southwest. There is not now, nor has there ever been, a criminal case holding that a national bank is required to choose how much money it will maintain in demand accounts (non-interest bearing, as here) or time accounts (interest bearing). Indeed, the fatal defect in the entire case is that the Waco bank was not only legally free to place some of its funds in demand accounts, but, also, that federal law expressly *prohibits* the payment of interest to the Waco bank on demand account funds [12 U.S.C. 371 (a)].

[2] Pages 3 and 4, Solicitor's *Memorandum in Opposition.*

In effect, the very simple and novel argument of the Solicitor is that this indictment indirectly seeks to compel a national bank to draw interest on funds even though the bank must have funds in a demand account to be able to honor its customers' business needs. These judgments have traditionally been left to the banks to determine, but *never* have they formed the basis of a criminal indictment.

3. Thirdly, the Solicitor attempts to reduce Petitioners' substantial "fair notice" argument to an argument that there was no willful misapplication of funds.[3] The "fair notice" argument cannot be dealt with in such cavalier fashion. The Solicitor does not understand the basic argument of Petitioners which is that the Government failed to give Petitioners fair notice that their alleged actions might constitute conversion of bank funds, willful or otherwise. Nevertheless, the Solicitor attempts to erroneously emphasize that Petitioners are simply arguing that their acts were not criminally willful and thus draw the conclusion that because the element of willfulness is for the jury, the review by certiorari should not be granted. The jury issue of willfulness has nothing to do with Petitioners' appeal. The issue is whether the Government gave Petitioners fair notice that their acts might constitute the

[3] Page 4, Solicitor's *Memorandum in Opposition.*

crime of conversion, or by their conduct led Petitioners to believe the loan was not illegal. This issue was properly raised under Rule 12, Fed. R. Crim. P., and is most appropriately before this Court for review.

The Government attempts *for the first time* to now draw a distinction between "traditional" uses of compensating balances and other uses which the Government now seeks to prohibit.[4] It is unfortunate that such distinctions now rather crudely sought to be drawn by the Government were not in existence at the time the loan in question was made over six years ago. The Solicitor's argument that Circular No. 31 warned against such practice as here sought to be punished splendidly overlooks the fact that Circular No. 31 was issued *after* the loan was made.

Even so, the Government's belated effort to even now attempt to define what practices are prohibited merely accentuates the strength of the "fair notice" argument of Petitioners.[5]

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[4] Pages 4 and 5, Solicitor's *Memorandum in Opposition.*

[5] The Government states at page 4 of its *Memorandum in Opposition* that the lending practice sought to be prohibited here is distinguished from "traditional" lending practices by the fact that a *third party,* such as the Waco bank, supplied the compensating balance, rather than the borrower himself. Petitioner has already directed this Court's attention to *The Antitrust Implications of Compensating Balances,* 58 Va.L.Rev. 1 (1972). This article reflects at page 3:

> "An increasingly popular means of satisfying the requirement [compensating balance] is through "link" financing, where the borrower arranges with a *third party,* typically an insurance company, mutual fund or pension fund, to supply the lender with the compensating deposit balance." (Brackets and emphasis added.)

Thus, the Government's attempt here to draw a distinction based on the fact that a *third party* supplied the funds for the compensating balance rather than the borrower himself is without merit. That practice was also popular and prevalent in the industry as of the date of the article in January, 1972, *six months before Petitioners were indicted* in June, 1972. Pension funds and mutual funds inherently involve the exercise of fiduciary duties with money similar to a bank, but apparently, the Justice Department, by waiting to this late date to hastily attempt to define the distinction between "traditional" practices and non-traditional practices, could not cover every loophole in their thesis. Hopefully, crimes will not be created by definitions of conduct sought by the prosecution in a brief, but by Congress or duly implemented regulations with fair notice to those affected.

Finally, the Solicitor contends that, in any event, the loan was *renewed* after Circular No. 31, and the indictment is therefore sufficient as charging the offense of misapplication after Circular No. 31 was issued. This argument is unsupported by any case. In fact, this Court has clearly held that *renewals* do not constitute a misapplication offense. *Coffin* v. *United States,* 162 U.S. 664,16 S.Ct. 943, at pp948-949, 40 L.Ed. 1109.[6]

4. The Solicitor's final argument again misses the point of this appeal. The Solicitor attempts, hopefully by now quite fruitlessly, that the fair notice defense is really Petitioners' way of stating the acts were not willful. In conclusion, the issue is whether the indictment, based on this new and novel combination of alleged acts, legally charges the crime of conversion.[7]

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[6] Petitioners respectfully apologize to the Court and the Solicitor regarding the earlier citation to *Coffin* v. *United States* whereby Petitioners cited 15 U.S. 432, 15 S.Ct. 394. This citation was to an earlier *Coffin* decision, but was not the opinion containing the principle cited here.

[7] The Solicitor's *Memorandum in Opposition* did not respond to the fact that the indictment was based on a conspiracy, not a substantive violation of 18 U.S.C. 656. Thus, the basic issue should be whether the alleged agreement was unlawful when made in December, 1969. Obviously, if the object of the conspiracy was

It is therefore respectfully prayed that the Petition for Writ of Certiorari be granted as is so earnestly needed.

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not unlawful at the time the alleged agreement took place, then the alleged unlawful conspiracy will not stand.

The fact that this is a conspiracy indictment highlights the need for review because the Government has sought to pick and choose among overt acts without any proof of what the essential operative facts are that give this case the characteristics of criminality.